No. 515

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945

JAMES F. KIRK, *Petitioner*,

vs.

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Wash.

PETITIONER'S REPLY BRIEF

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Except for the mere statement (R. Br. 9) that this case presents no conflict of decisions or important question of law, respondent does not attack petitioner's reasons given for this court to issue writ of certiorari. Respondent contents himself with arguing that the decision below is correct. We respectfully submit, his reasons given for upholding the judgment below are not sound.

Respondent says that petitioner's federal sentence must mean that it commences upon petitioner's "release from confinement" rather than "release from imprisonment" because, otherwise, it would become effective only if petitioner were pardoned by the state. We think the stronger argument is that, had the District Court intended its sentence to become effective upon "release from physical confinement" rather than "release from imprisonment," it would and should have said so. The district judge was bound to know

judicially that release on parole, under California law, was not release from imprisonment. Where the "meticulously precise language" required by this court in criminal sentences (*U. S. v. Daugherty*, 269 U.S. 360, 70 L. ed. 309) is not used and there can be any argument as to the meaning of the terms used, the doubt should be resolved in favor of the prisoner.

This was the holding in *Ex parte Stewart*, 24 Cal. (2d) 344, 149 P.(2d) 689, where a prisoner sentenced to death had his sentence commuted by the Governor on condition that he be imprisoned during the term of his natural life in the state prison. The parole board refused to consider his application for parole on the ground that the words "imprisonment during his natural life" meant something different than "life imprisonment" and that the use of the first phrase expressed the intention of the Governor to prevent parole. In reversing the parole board, the Supreme Court of California said:

> "Petitioner contends * * * that had Governor Rolph intended that petitioner should serve his life sentence without parole, it would have been a simple matter for him to have inserted in his order the words 'without parole' or words of similar import. On the other hand, the board * * * contends that some effect must be given to the word 'natural' * * *, that had the Governor intended that petitioner should serve only an ordinary life sentence, * * * he would not have taken the pains to definitely state that petitioner 'should be imprisoned during the term of his natural life'; and that had the Governor intended that petitioner's term of imprisonment was to be

subject to parole, he could easily have, and no doubt would have, so stated in his order * * *. (689-90)

"* * * We think it is apparent that it was not the intention of Governor Rolph, in commuting petitioner's sentence, to impose as a condition of his order of commutation that petitioner should not be subject to the parole law of the state.

"It might further be observed that if the order of commutation in petitioner's case is ambiguous or uncertain, and is really capable of two constructions equally reasonable, a construction should be given it which would be favorable to the prisoner. The parole law is humanitarian in character and its purpose and object is to mitigate the rigor of the old penitentiary system. *Roberts v. Duffy*, 167 Cal. 629, 634, 140 P. 260.

"It is a fundamental rule of law that no citizen should be deprived of his liberty for the violation of a law which is uncertain and ambiguous (*In re Peppers*, 189 Cal. 682, 209 P. 896; *People v. Pace*, 73 Cal. App. 548, 238 P. 1089) and the same situation exists where one's liberty is questioned by an order or judgment which is not plain and certain in its terms, 8 Cal. Jur. 465, §482; *Ex parte Harrison*, 63 Cal. 299. This is especially true where the questioned order or judgment is susceptible of two interpretations, one of which is favorable and the other is adverse to the rights and privileges of the person affected thereby." (p. 690-91)

Release on parole is not release from imprisonment. Petitioner's federal sentence does not become effective until he is released from imprisonment. Be-

ing on parole, his detention by respondent is unlawful.

But, respondent says, whether petitioner's custody has been rightfully transferred from the state to respondent is not a question that petitioner can raise. He cites cases (R. Br. 7, 8) to the effect that where two jurisdictions have *equal rights* to the custody of a prisoner, the prisoner has no right to insist that one jurisdiction rather than another be granted his custody. Such argument misses the point. Petitioner's position is that, because the federal sentence did not become effective until his release from all state imprisonment, and since, being on parole from the state, he is still imprisoned by the state, the federal jurisdiction has *no right at all* to his custody. The rule of the cases cited, therefore, does not apply here. That was clearly pointed out in *Johnston v. Wright*, 137 F.(2d) 914, 917, where this argument was also made. The court there said, referring to the statement from *Wall v. Hudspeth*, 108 F.(2d) 865, that "either the federal or state government may voluntarily surrender its prisoner to the other without the consent of the prisoner * * *":

> "But this principle gives no support to the point made by the warden-appellant, that Wright has no standing in the instant situation. Wright claims that there is no legal cause for his detention by the federal authorities while they in turn assert the existence of a legal cause. This is the very basic purpose of the great writ of habeas corpus."

When it is remembered that Wright, being a prisoner on parole from the state of Illinois, was held

by the warden on a commitment under a sentence which commenced to run upon the expiration of his state sentence, it is apparent that there is no difference between the position of Wright and the position of petitioner here.

In any event, it will be seen from those cases that, in each, the consent of the sovereignty to the transfer of the custody of the prisoner was either actually shown or presumed. That such consent is necessary is shown by *Ponzi v. Fessenden*, 258 U.S. 254.

On this phase of the matter, respondent says (R. Br. 8) that the consent of the state is found in the terms of the parole and in the California parole statutes. Respondent does not distinguish between the consent of the parole board and the state of California. True enough, the parole board has consented to this change of custody but that board has no power to make such consent binding on the State of California or petitioner. Respondent argues, as did the Circuit Court of Appeals, that, because the statutes allow the parole board to impose such conditions upon the parole as it deems proper, the condition of the transfer of custody is proper, but both respondent and the Circuit Court have failed to consider §3056 (App. to Petition 1-2), which provides that,

> "prisoners on parole shall remain under the legal custody of the * * * board * * * and shall be subject at any time to be taken back within the enclosures of the prison."

In the face of this statutory mandate that the board retain the custody of the prisoner, how is it possible for it to grant that custody to another jurisdiction?

The simplest rules of construction of statutes require that they be read together and each section be given due force and effect. The Circuit Court of Appeals and respondent read out of existence §3056 in order to uphold the detention of petitioner by respondent. The statutes plainly provide that the parole board may attach such conditions as it desires to paroles except that it must retain custody of the prisoner. Therefore, a parole into the custody of another sovereignty is void.

Respondent does not deny that the question here involved has not been decided by this court. He passes it off as unimportant. We think the question involved is of sufficient importance to be reviewed by this court: Should parole, designed for the rehabilitation of a prisoner, be used as a scheme of transferring the custody of a prisoner from one sovereignty to the other, thus depriving the prisoner of any possibility of rehabilitation or parole?

Respectfully submitted,

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End